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Recd from and drafted by David Remes - Priv'd & Confidential
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wt/ Cipollone

I. **CIPOLLONE**

A. Overview

1. Issue in case

a. Does preemption cover tort claims?

b. If so, to what extent?

2. Cigarette companies consider decision a win because --

a. Court accepted proposition that preemption extends to tort claims

b. Court held preempted the easiest claims for plaintiffs to pursue

3. More of a victory for the industry than for plaintiffs.

a. Not a "red" light for plaintiffs but not a "green" light either, as the anti's suggest

b. A "yellow light" that lets plaintiffs proceed, but on claims that are the most difficult to win

4. Wall Street is sanguine; Pertschuk is depressed.

B. Court accepted basic proposition that preemption extends to tort claims (though it did not go as far as some lower courts).

1. Three opinions

a. At one extreme, Blackmun, Kennedy, Souter -- No preemption of common law claims at all.

b. At other extreme, Scalia and Thomas -- petitioner's common law claims generally were preempted.

c. In the middle, a Stevens opinion.

(1) Majority portion -- No preemption of common law claims under 1965 Act.

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(2) Plurality portion -- Some preemption of common law claims under the 1969 Act.

2. Stevens opinion

a. Claims easiest for plaintiffs to pursue -- those attacking cigarette advertising as inducing people to smoke -- were held to be preempted.

(1) Failure to warn in advertising and promotion

(2) Neutralization of warning via advertising and promotion

b. Claims more difficult for plaintiffs to pursue -- those requiring proof of intentional wrongdoing -- were held not to be preempted.

(1) Breach of express warranty

(2) Fraudulent misrepresentation

(3) Conspiracy to conceal or misrepresent material facts

3. Stevens opinion, neither clear nor consistent, will --

a. Generate extended disputes over its meaning and efforts to present pre-empted claims as nonpreempted ones.

b. Drive antis back to the drawing board to devise new litigation strategies (Cordova and Broin).

c. Not produce a flood of new cases.

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II. FEDERAL IMPACT OF CIPOLLONE -- THE ABRAMS LETTER

A. Overview

1. Court's decision seems less likely to generate pressure to repeal preemption than a decision immunizing the industry completely would have.

2. Abrams letter shows that the anti's will attempt none the less to use the pro-preemption aspects of the decision to promote repeal of preemption.

3. This, however, involves attacking us where we're strongest -- the advertising issue, where we have allies and the First Amendment.

B. The Abrams letter

1. Background

   a. Lists 26 other AG's as signatories, but some may not have approved.

   b. Genesis uncertain -- Danforth to Abrams? Staff to staff?

   c. Professed frustration with federal "inactivity" on Joe Camel

2. Substance

   a. Drafted and circulated before Cipollone, original focus was claimed inability of AG's to take action against Joe Camel.

   b. Revised post-Cipollone, focus now seems to be AG's inability to attack "implied claims" in general, including "image advertising," as well as "advertising to youth."

      (1) The AG's attack § 1334(b) as limiting their traditional powers re "false, deceptive or misleading" advertising.

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(2) But the AGs do not claim that they are precluded from pursuing "intentionally fraudulent" cigarette advertising claims.

(3) The AG's instead seek power to ensure that cigarette companies do not "advertise to youth" or "fail to inform" or "play down" health risks.

(a) Code for content-control, tombstone restrictions, labeling requirements a la various Synar bills

(4) The AG's also want states to be free to prohibit cigarette advertisements near schools and other centers of youth activities.

(a) Code for billboard placement restrictions a la recent Kennedy bills

c. Observation

(1) The AG's claim that the cigarette companies enjoy unique protection, but it's the AG's who want to treat cigarette advertising uniquely -- as inherently deceptive and misleading.

(2) Repeal of preemption would create the conditions for state and local action banning cigarette advertising, in violation of the First Amendment and long-standing congressional policy.

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III. THE DINGELL LETTER

A. Background

1. Calls to TI and C&B from Sheila Kaplan of Legal Times

2. According to Kaplan --

   a. Anti's preparing letter to Dingell requesting investigation based (evidently) on Sarokin opinion in Haines

   b. Basic claim is that industry perpetrated fraud on Congress with respect to smoking and health via CTR and other industry witnesses

   c. As of Friday, Kaplan said she had not seen letter, just "bits and pieces"

B. Sarokin opinion

1. Judge Sarokin issued a widely publicized opinion in February in the Haines case.

2. Issue is whether plaintiff may have access to documents reflecting certain communications by and among cigarette company counsel and their clients.

3. Under "crime-fraud" exception to the attorney-client privilege, lawyer communications are not protected from disclosure if the work reflected was performed in furtherance of a crime or fraud.

4. Defendants assert attorney-client privilege while plaintiff asserts crime-fraud exception

5. Status

   a. Magistrate ruled for defendants, holding that privilege protects documents from disclosure

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b. Sarokin overruled the magistrate, holding that "crime-fraud" exception overcame claim of privilege

c. Defendants are seeking relief from Third Circuit.

(1) Briefs have been filed

(2) Disposition possible in August

6. Sarokin asserted that there's evidence that the cigarette industry has perpetrated a "public relations fraud," to wit --

a. Industry was aware of the risks of smoking and concerned about impact on cigarette sales of public awareness.

b. Industry sought to discredit or neutralize adverse information by establishing a fake "independent" research organization called CTR to examine risks of smoking and report to the public

c. Industry diverted damning research from Scientific Advisory Board (SAB) grant program into "secret" special research projects and allowed only positive research to emerge, thereby deceiving public

C. What is the apparent hook for a Congressional inquiry?

1. Sarokin stated that one purpose of the Special Projects research was "to develop evidence supporting defendants' positions in existing and anticipated litigation and Congressional hearings" (slip op. 3).

2. A 1978 memorandum, quoted in Sarokin's opinion, purportedly states that "CTR has provided spokesmen for the industry at Congressional hearings. The monies spent on CTR provides a base for

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introduction of witnesses" (slip op. 35).

D. Observations

1. Request to Dingell clearly premature in view of Third Circuit proceeding.

2. The documents don't suggest, much less show, any wrongdoing. The basic theory has been aired before and was rejected by the Cipollone jury.

3. We can't discuss the documents themselves without compromising our claim of privilege.

4. We can, however, explain why plaintiff's fraud claim is completely unfounded. It rests on the basic mistaken notions that the Special Projects research was "secret" and that defendants misrepresented the independence of SAB

a. The "secret research" purportedly concealed by wrongful claims of privilege was not secret. The research results were produced to plaintiff. Researchers were free to and did publish results of research. No attempt to conceal the research. No evidence of "channeling".

b. Background

(1) Beginning in 1954, CTR members provided funding for grant program administered by independent SAB

(2) Beginning in 1966, CTR members also began to fund a separate research program known as "Special Projects," to help defense of litigation anticipated by company lawyers in the wake of the 1964 Surgeon General's report and hearings leading to the 1965 federal legislation.

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c. There was no diversion of research from SAB to Special Projects, and CTR special projects were not secret or hidden behind claims of attorney-client privilege.

5. What accounts for Sarokin's view of the case? BIAS

a. Sarokin clearly hostile to industry.

b. Media-friendly rhetoric of opinion shows he's prejudged the case.

c. Similar tactic in Cipollone on motion for directed verdict.

d. In latest opinion, quotes from privileged documents, destroying confidentiality.

e. Went beyond record, relying on Cipollone documents

(1) Different parties

(2) No notice to defendants

(3) Jury found no fraud

E. Recommendation

If letter indeed says that Sarokin's opinion provides basis for congressional inquiry, answer is that this is simply more harassment of the industry -- old wine in new bottles. Sarokin is biased, Cipollone jury rejected his view of the evidence before, and in any event consideration of an inquiry is premature before Third Circuit rules.

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